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IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 21,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

The Illinois Bell Telephone Company and International Brotherhood of Electrical Workers, Local 21, are parties to a collective bargaining agreement that provides for arbitration of "matters which involve [t]he interpretation or application of any of the terms or provisions of this Agreement, unless excluded by specific provisions of this Agreement." Pet. App. 2a-3a.

In early 2006, the Union sought to arbitrate a dispute over the Company's unilateral implementation of a new employee evaluation system. Pet.

App. 2a. In seeking arbitration, the Union maintained that the Company's action violated two complementary provisions of the agreement:

> "First, the recognition clause, § 1.01 of the CBA, [which] states: 'The Company recognizes the Union as the exclusive bargaining agent for [the] employees of the Company . . . .' Second, § 4.01[, which] requires 'mutual responsibility and respect' and a fair application of the CBA 'in accord with its intent and meaning and consistent with the Union's status as exclusive bargaining representative.'" Pet. App. 3a.[1]

Finding that "[n]one of the above provisions have been explicitly excluded from arbitration, and nothing in the CBA specifically pertains to the implementation of performance guidelines," the courts below ordered the Company to arbitrate. *Ibid.*

ARGUMENT

I. The petitioner's principal contention—and its only contention that might, if true, implicate a matter worthy of this Court's attention—is that, in affirming the district court's order to arbitrate, "the Seventh Circuit has repudiated its judicial responsibility to determine arbitrability" as articulated in *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986). Pet. 21-22. That contention is, however, patently false. The Seventh Circuit fulfilled that judicial responsibility with absolute fidelity to the letter and spirit of *AT&T Technologies*.

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[1] The Union also relied upon the requirement of "just cause" for discipline contained in § 13.02, but that provision did not figure into the analysis of the courts below.

A. To put the petitioner's contention in its legal context, it is helpful to begin by setting out, in the Court's own words, *AT&T Technologies*' four principles regarding the judicial responsibility to determine arbitrability. The first two principles go to the judicial role in that regard:

> "The first principle . . . is that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.
>
> "The second rule, which follows inexorably from the first, is that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." 475 U.S. at 648-49 (citations and quotation marks omitted).

And, the last two—which are pointedly ignored in the petition for certiorari—go to the method by which the courts determine arbitrability:

> "The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether arguable or not, indeed even if it appears to the court

to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.

"Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder . . . .' In such cases, in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." 475 U.S. at 649-50 (citations, brackets and quotation marks omitted).

B. Carefully attending to the directions stated in *AT&T Technologies*' first two principles, the Seventh Circuit began from the proposition that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" and its corollary that "the question of arbitrability is properly decided by a court." Pet. App. 3a-4a (citations and quotation marks omitted). Accordingly, the Seventh Circuit "review[ed] the district court's ruling to compel arbitration de novo." *Id.* at 3a (citation and quotation marks omitted).

"In order to determine whether the parties have agreed to submit this particular dispute to arbitration," the Seventh Circuit "turn[ed] to the specific language of the arbitration clause." Pet. App. 5a. The court of appeals began by observing that "the arbitration clause in this case applies to any dispute that would require the adjudicator to interpret or apply any term or provision of the CBA, so long as another provision of the CBA does not specifically exclude that topic from arbitration." *Id.* at 5a-6a. Based on this understanding of the arbitration clause, the court of appeals concluded that, so long as the contract provisions relied upon by the Union were "susceptible to an interpretation wherein the Company's actions have breached its duties" and were "encompassed by the arbitration provision," the court "must compel arbitration." *Id.* at 6a.

With regard to the "susceptible to interpretation" test, the Seventh Circuit noted that the Union based its claim "of arbitrability upon § 4.01, the mutual respect and responsibility clause" and that "[t]he Union has also argued that this dispute involves the interpretation and application of the recognition clause, § 1.01." Pet. App. 6a. While the district court

had focused on § 4.01, the court of appeals stated that it "prefer[red] to begin [its] analysis with the recognition clause." *Ibid.* As a first step, the Seventh Circuit observed that "[t]he recognition clause is susceptible to any number of interpretations that may impose duties of notice and negotiation upon the Company." *Ibid.* The court of appeals then added that "[t]he Union has alleged that the Company did not bargain in good faith prior to implementation of the guidelines and has submitted employee statements alleging that unilateral implementation of the performance guidelines threatens the continued relationship between the parties." *Id.* at 10a-11a. On this basis, the court of appeals concluded "that the recognition clause is an adequate basis for arbitration in this case." *Id.* at 11a. The court of appeals pointedly noted that, in specifying the provisions excluded from arbitration, "[t]he parties could have exempted the recognition clause from arbitration, but chose not to." *Id.* at 10a.

The Seventh Circuit's determination that the Union's grievance is arbitrable is buttressed by a consideration of the other contract provision, § 4.01, that the Union invoked. "Section 4.01 of Article 4 of the CBA provides that the parties' dealings with each other be 'characterized by mutual responsibility and respect' and that the parties 'apply the terms of the [CBA] fairly' and in accord with the CBA's intent and meaning and consistent with IBEW's status as the exclusive bargaining representative of all employees." *Id.* at 22a-23a. Since "neither part[y] asserts that Section 4.01 is excluded from the scope of CBA's arbitration provision" and "[t]he language of Section 4.01 is broad and nebulous," the district court had concluded that "the language of Section 4.01 could apply to Bell's decision to implement the Guidelines."

Id. at 23a. On this basis, the district court "found that IBEW's reference to a violation of Article 4 in its grievance provides an adequate ground to compel arbitration of the grievance under Section 13.16 of the CBA." *Ibid.*

In sum, the decisions below belie the petitioner's contention that the Seventh Circuit "repudiated its judicial responsibility to determine arbitrability." Pet. 21-22. That court carefully attended to the precise language of the arbitration clause in question, to the precise nature of the claim that the Union sought to arbitrate and to the precise contract clauses implicated by that claim. Indeed, the court of appeals gave the Company every benefit of the doubt by determining for itself whether "the recognition clause is susceptible to an interpretation wherein the Company's actions have breached its duties" in the course of deciding whether "the recognition clause is encompassed by the arbitration provision." Pet. App. 6a.[2] Only after engaging in this close scrutiny, did the Seventh Circuit determine that the Union's grievance did "involve [t]he interpretation or application of . . . the terms or provisions of th[e] Agreement" and is not "excluded [from arbitration] by specific provisions of th[e] Agreement," and thus was subject to arbitration under the terms of the agreement.

II. The Company's real objection—and the real point of its petition for certiorari—is not that the

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[2] By making that determination for itself, the Seventh Circuit pressed against the outer limit imposed by *AT&T Technologies*' "third principle," which cautions that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." 475 U.S. at 649.

Seventh Circuit "repudiated its judicial responsibility to determine arbitrability," Pet. 21-21, but that, by finding that the recognition clause "is susceptible to an interpretation" by an arbitrator that supports the Union's claim, "the panel majority [in effect] interpreted [the recognition] clause in an 'impossible' manner that conflicts with its well-settled meaning," *id.* at 7. *See id.* at 7-16. That complaint is without substance.

The dispositive point in this regard is that *AT&T Technologies* makes it plain that, in determining arbitrability, the courts are *not* to determine the proper interpretation of the contract clause invoked by the grievance or to decide in any other way the merits of the grievance. Those are matters for the arbitrator. And, the Seventh Circuit's decision leaves the Company free to argue its interpretation of the recognition clause to the arbitrator.[3]

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[3] It is worthy of note that, while the Company proceeds as though the dispute here turns on the abstract question of the proper interpretation of a standard form recognition clause standing alone, the Union's grievance in fact rests on a far more specific claim grounded in this particular collective bargaining agreement that, against the background of an agreement containing a broad no-strike clause "strictly prohibiting the Union from striking under any circumstance," Pet. App. 3a, the Company's "implementation of the guidelines" without "bargain[ing] in good faith" and in a manner that "threatens the continued relationship between the parties," *id.* at 10a-11a, violated the commitment contained in § 1.01 to "recognize[] the Union as the exclusive bargaining agent for [the] employees of the Company," *id.* at 3a, *and* the commitments contained in § 4.01 to conduct "all dealings" in a manner "characterized by mutual responsibility and respect" and to apply the agreement "fairly, ~~in~~ accord with its intent and meaning and consistent with [the Union's] status as exclusive representative," *id.* at 20a.

At the risk of redundancy, we quote the relevant passage from the *AT&T Technologies* opinion—a passage that, as we have noted, the petitioner assiduously seeks to ignore:

> "Whether arguable or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *AT&T Technologies*, 475 U.S. at 649-650 (citation and quotation marks omitted).

The Company insists that the proper interpretation of a recognition clause presents a matter of special importance in determining arbitrability due to the frequency with which such clauses appear in collective bargaining agreements. Pet. 14-15 ("The impact of the Seventh Circuit's decision is staggering."). But the Seventh Circuit's decision here is simply the latest in an unbroken string of circuit court precedents stretching back some fifty years holding that grievances based on a recognition clause, like claims based on other contract clauses, are not to be decided on the merits by the courts in determining arbitrability but rather are to be submitted to arbitration for determination on the merits by the arbitrator. *See E. M. Diagnostic Systems, Inc. v.*

Local 169, Int'l. Brotherhood of Teamsters, 812 F.2d 91, 95-96 (3d Cir. 1987); *F & M Schaefer Brewing Co. v. Local 49, Int'l. Union of United Brewery Workers,* 420 F.2d 854, 857 (2d Cir. 1970); *Humble Oil & Refining Co. v. Indep. Industrial Workers' Union,* 337 F.2d 321, 324 (5th Cir. 1964); *Local 1912, Int'l. Assoc. of Machinists v. U.S. Potash Co.,* 270 F.2d 496, 497-99 (10th Cir. 1959), *cert. denied,* 363 U.S. 845 (1960). Petitioner has made no showing that these decisions are unsound in theory or practice.

Faced with that unbroken string of circuit court precedents, the petition does not even pretend that there a conflict between the Seventh Circuit's decision and the decisions of this Court or of another circuit regarding the proper treatment of suits to compel arbitration of "recognition clause" grievances.

The only remotely analogous case cited by the petitioner is the Seventh Circuit's own earlier decision in *Indep. Petroleum Workers v. Am. Oil Co.,* 324 F.2d 903 (7th Cir. 1963), *aff'd. mem. by an equally divided Court,* 379 U.S. 130 (1964) ("*Amoco*"). Pet. 13-14. The Seventh Circuit panel distinguished its prior decision in *Amoco* from the instant case on several grounds, including relevant differences in the contract language and the fact that the union's attempt to compel arbitration in that case was barred by collateral estoppel, "because the union had already attempted to compel arbitration of the same issue in a previous suit." Pet. App. 7a-8a. Any broader reading of the *Amoco* decision would bring it into direct conflict with this Court's *Steelworkers Trilogy* cases, which the *Amoco* court declined to follow. 324 F.2d at 905-06. *See Local 710, Int'l. Brotherhood of Teamsters v. Montgomery Ward & Co.,* 708 F. Supp. 209, 212 (N.D. Ill. 1989) ("question[ing] the

compatibility of [*Amoco*] with the directives set forth in *AT & T Tech.*").

Petitioner's citation of *Aluminum Co. of Amer. v. UAW*, 630 F.2d 1340 (9th Cir. 1980) ("*Alcoa*"), as creating an inter-circuit conflict, Pet. 16-18, is not even colorable. *Alcoa* "held that a grievance concerning the fairness of an attendance control plan . . . is not subject to arbitration under the terms of [a] collective bargaining agreement" that expressly forbade an arbitrator to "entertain jurisdiction of any subject matter not covered" by the agreement. *Id.* at 1341 & 1342. In *Alcoa*, the union's "grievance did not seek to settle an issue assertedly arising under the contract" but merely asserted that the plan "should be reconsidered because it was 'unfair.'" *Id.* at 1343 n. 6. Nevertheless, "[t]he arbitrator concluded he had jurisdiction because operation of the [attendance control plan] might lead to an employee being suspended or discharged, and this disciplinary action might violate a 'just cause' provision in the agreement." *Id.* at 1342. The Ninth Circuit disagreed with the arbitrator's analysis, observing that "at the time the grievance was filed, the [attendance control plan] had not resulted in any disciplinary action against any employee" and that "[n]early any general policy adopted by an employer, especially those involving wages, hours, or working conditions, could lead to suspension, discharge, or dismissal of an employee." *Id.* at 1343. That point has no application to the instant case in which the Union has alleged that the Company's actions constitute *a present breach* of two inter-related contract provisions.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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